K SARAVANAN S KARUPPIAH

v.

PP

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
KC VOHRAH JCA
MOHD NOOR AHMAD JCA
[CRIMINAL APPEAL NO: A-05-18-2000]
24 JUNE 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking 2279.9 g cannabis - Appeal against conviction and sentence - Failure by prosecution to call witness - Presumption of adverse inference under s. 114(g) of Evidence Act 1950, whether should be invoked - Cannabis recovered at time of arrest, whether differed from that produced in court - Samples of drug taken for analysis, whether complied with s. 37(j) DDA 1952 - Misdirection by trial judge, whether overriding overwhelming evidence supported conviction of appellant*

EVIDENCE: *Witness - Failure of prosecution to call witness - Whether presumption of adverse inference should be invoked against prosecution - Whether overriding overwhelming evidence supported conviction of accused - Evidence Act 1950, s. 114(g)*

The appellant was convicted and sentenced to death on a charge of trafficking in 2279.9 grammes of cannabis under s. 39B(1)(A) of the Dangerous Drugs Act 1952 ('DDA'). He appealed against his conviction and sentence.

The issues were: (1) whether an adverse inference under s. 114(g) of the Evidence Act 1950 ('the Act') might be drawn against the prosecution for failing to call a witness who had played a significant role in the trap and arrest of the appellant by the police; (2) whether there was a break in the chain of evidence in relation to the identity of the cannabis, especially as to its colour, recovered at the time of the arrest until its production in court; (3) whether s. 37(j) of the DDA was not complied with when samples of the drug were taken for analysis; (4) whether the learned judge had misdirected himself on the failure of the defence to call witnesses to support the appellant's version of what had taken place; and (5) whether the inclusion of the words "on a balance of probabilities" by the learned judge had placed an onerous burden on the defence and therefore a serious misdirection.

Held:
Per Mohd Noor Ahmad JCA

[1] In view of the clear, uncontradicted evidence adduced by the prosecution, even if the witness concerned was called to testify, it would not have made any difference to the case. As such, the presumption of an adverse inference could not be invoked against the prosecution. Further, the learned judge had directed his mind to this point and therefore there was no serious misdirection. In addition, the prosecution gave its reasons for not calling the said witness. Therefore, the prosecution had sufficiently discharged its statutory duty in this respect. (pp 150 d-i & 151 a-d)

[2] There was no merit in the appellant's contention as to the colour of the cannabis. There were no inconsistencies in regard to the evidence adduced. (p 152 a-d)

[3] The provisions of s. 37(j) of the Act had been complied with. The court agreed with the learned judge that the analysis was properly undertaken and that as there was no evidence from any expert to contradict the chemist's finding in relation thereto, it must be accepted at face value as true and accurate. (p 152 e-h)

[4] The learned judge was wrong to have commented on the failure of the defence to call witnesses to support the appellant's version of the events that had taken place. However, the misdirection by itself was not sufficient to displace the findings of fact and the conclusions made by the learned judge in view of the overwhelming evidence that supported the conviction. (p 153 a-b)

[5] The inclusion of the words "on a balance of probabilities" by the learned judge must not be read in isolation but read together with the whole judgment. From the relevant passages therein, the court was satisfied that the learned judge had made the correct conclusion on the burden of proof after having properly and adequately assessed the evidence before him especially the defence. There was overwhelming evidence to show that the prosecution had proved its case beyond reasonable doubt and that the defence had failed to raise any reasonable doubt on the prosecution case. Therefore, this court regarded the inclusion of the words in question as mere verbosity. (pp 153 e-h & 154 a-b)

[6] After having gone through the evidence adduced by the prosecution and having no doubt that there was ample evidence to show at the end of the prosecution case that the prosecution had proved its case beyond reasonable doubt, the choice of words *"prima facie"* was only the wrong usage of words. Further, there was no substantial miscarriage of justice and therefore the proviso to s. 60(1) of the Courts of Judicature Act 1964 was applicable. (p 154 c-d)

[Appeal dismissed.]

a *[**Bahasa Malaysia** Translation Of Headnotes*

Perayu telah disabitkan dan dijatuhkan hukuman mati atas tuduhan mengedar 2279.9 gram ganja di bawah s. 39B(1)(A) Akta Dadah Berbahaya 1952 ('ADB'). Beliau merayu terhadap sabitan dan hukuman.

b Isu-isunya adalah: (1) sama ada inferens yang menentang di bawah s. 114(g) Akta Keterangan 1950 ('Akta tersebut') boleh digunakan terhadap pendakwaan kerana gagal memanggil seorang saksi yang memainkan peranan penting di dalam penangkapan perayu; (2) sama ada terdapat pemecahan pada rangkaian bukti-bukti yang berkait dengan identiti ganja tersebut, terutamanya warnanya, *c* semasa dijumpai pada masa tangkapan sehingga ditunjukkan di mahkamah; (3) sama ada s. 37(j) ADB tidak dipatuhi apabila contoh-contoh dadah tersebut diambil untuk analisa; (4) sama ada hakim yang bijaksana telah salah arah di dalam kegagalan pembelaan memanggil saksi-saksi menyokong versi perayu atas apa yang telah berlaku; dan (5) sama ada kemasukan perkataan "atas *d* imbangan kebarangkalian" oleh hakim yang bijaksana telah meletakkan beban yang berat ke atas pembelaan dan seterusnya satu salah arah yang serius.

Diputuskan:
Oleh Mohd Noor Ahmad HMR

e **[1]** Merujuk kepada bukti-bukti jelas dan tidak bercanggah yang dikemukakan oleh pendakwaan, sekiranya saksi yang berkaitan dipanggil memberi keterangan, ianya tidak akan membawa apa-apa perubahan kepada kes. Seterusnya, andaian inferens yang menentang tidak boleh dibuat terhadap pendakwaan. Tambahan lagi, hakim yang bijaksana telah mengarahkan pemikirannya terhadap poin ini dan seterusnya tiada salah arah yang serius. *f* Lagipun, pendakwaan telah memberikan alasannya untuk tidak memanggil saksi tersebut. Oleh itu, pendakwaan telah menjalankan kewajipan statutorinya di dalam perkara ini.

[2] Tiada merit di dalam hujah perayu terhadap warna ganja tersebut. Tiada *g* ketidakseimbangan bukti-bukti yang ditunjukkan.

[3] Peruntukan s. 37(j) Akta tersebut telah dipatuhi. Mahkamah bersetuju dengan hakim yang bijaksana bahawa analisa tersebut telah dilakukan dengan sempurna dan tiada bukti ditunjukkan oleh mana-mana pakar untuk menyangkal kesimpulan ahli kimia dan seterusnya mestilah diterima *h* sebagai benar dan tepat.

[4] Hakim yang bijaksana telah tersilap apabila membuat komen terhadap kegagalan pembelaan memanggil saksi menyokong versi perayu terhadap apa yang telah berlaku. Bagaimanapun salah arah sendiri tidak mencukupi *i* untuk menggantikan penemuan fakta-fakta dan kesimpulan yang dibuat oleh hakim yang bijaksana ke atas bukti-bukti menyeluruh yang menyokong sabitan.

[5] Kemasukan perkataan "atas imbangan kebarangkalian" oleh hakim yang bijaksana tidak boleh dibaca secara berasingan tetapi bersama-sama dengan keseluruhan penghakiman. Daripada perenggan-perenggan yang berkenaan, mahkamah berpuashati bahawa hakim yang bijaksana telah membuat kesimpulan yang betul terhadap beban pembuktian setelah meneliti bukti-bukti di hadapannya secara sempurna dan cukup terutamanya pembelaan. Terdapat bukti menyeluruh yang menunjukkan pendakwaan telah membuktikan kesnya tanpa sebarang keraguan munasabah dan pembelaan gagal menimbulkan sebarang keraguan terhadap kes pendakwaan. Oleh itu, mahkamah ini menganggap kemasukkan perkataan tersebut sebagai hanya pemakaian perkataan yang tidak perlu.

[6] Setelah meneliti bukti-bukti yang ditunjukkan oleh pendakwaan dan tiada keraguan bahawa terdapat cukup bukti untuk ditunjukkan pada akhir kes pendakwaan bahawa pendakwaan telah membuktikan kesnya tanpa sebarang keraguan munasabah, pemilihan perkataan *"prima facie"* hanya merupakan penggunaan perkataan yang salah. Seterusnya, tiada salah laksana keadilan yang besar dan seterusnya proviso kepada s. 60(1) Akta Mahkamah Kehakiman 1964 adalah terpakai.

Rayuan ditolak.]

Case(s) referred to:
Goh Ah Yew v. PP [1949] 15 MLJ 150 ***(refd)***
Illian & Anor v. PP [1988] 1 MLJ 421 ***(refd)***
Mohamed Ali v. PP [1962] 28 MLJ 230 ***(refd)***
Shanmugam Munusamy v. PP [1999] 1 CLJ 783 ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60(1)
Evidence Act 1950, ss. 114(g), 37(j)

For the appellant - Gurbachan Singh (R Naidu); M/s Ng Choo Beng, R Naidu & Partners
For the respondent - Kamarul Hisham DPP (Kamal Bahrain DPP)

[Appeal from High Court, Ipoh; Criminal Trial No: 45-5-1999]

Reported by Usha Thiagarajah

JUDGMENT

Mohd Noor Ahmad JCA:
The appellant was convicted and sentenced to death on a charge of trafficking in 2279.9 grammes of cannabis. The charge reads:

Bahawa kamu bersama-sama pada 16/9/98 jam lebih kurang 11.30 malam di tepi Restoran Syuen, Taman Klebang, Chemor, Ipoh, di dalam Daerah Kuala Kinta, di dalam Negeri Perak, telah didapati mengedar dadah ganja sejenis dadah berbahaya sejumlah berat 2279.9 grams, dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dibaca bersama Seksyen 34 Kanun Keseksaan.

On appeal, we dismissed the appeal and confirmed the conviction and sentence. We now give our reasons.

The prosecution case.

Briefly, on the night of 27 July 1998, Detective Sargeant Busra (SP8) posing as a buyer, was introduced by his informer to one Suresh. The informer left the scene and the two had some discussion on a drug-deal. Suresh told SP8 that the price of cannabis was RM2,500 per kilogram. On 16 September 1998 at 4pm Suresh introduced SP8 to the appellant. During their initial discussion the appellant agreed to supply SP8 3 kilograms of cannabis and asked SP8 for RM7,500 as payment. SP8 disagreed and told the appellant that payment was to be made by cash on delivery basis. Then, at the appellant's request the three of them left in SP8's car for Restoran Syuen where they had a drink. After that the appellant borrowed SP8's car to fetch the drugs, leaving SP8 and Suresh at the restaurant. At about 7pm the appellant returned and asked SP8 to come back to the restaurant at 11pm the same night. The police operation to trap and arrest the appellant was set in motion around the restaurant at 10.15pm. The police party waited for about 40 minutes but the operation was called off as the appellant did not turn up. Immediately after it was called off SP8 received a call through his handphone from the appellant requesting SP8 to wait at the restaurant as the appellant was coming over. The trap was reset. Some moments later the appellant arrived on a motorcycle carrying one Murthi (the co-accused) as pillion. The appellant stopped next to SP8's car and left after telling SP8 to wait there while he went to fetch the drug. Ten minutes later he returned with the pillion and parked the motorcycle behind SP8's car. Then, he went over to SP8 carrying with him a black plastic bag and sat on the front passenger's seat next to SP8 while Murthi took the back seat. SP8 then inspected the contents of the black plastic bag which the appellant brought and found it to contain three slabs of compressed cannabis. Thereafter, at a prearranged signal the police party closed in and arrested the appellant and Murthi. At the time of the arrest the black plastic bag which contained the drug was found on the appellant's lap. The drug was sent for analysis and the Chemist confirmed that it was cannabis. The learned judge accepted the Chemist's findings.

Murthi, who was charged together with the appellant on a joint charge of trafficking was acquitted and discharged without his defence been called. However, the appellant was ordered to enter his defence on the unamended charge.

The appellant's defence/version of events.

The appellant gave evidence on oath. Briefly, he stated that on that night at 7pm he and Murthi went to the restaurant for a drink until 10pm. As they were about to leave the restaurant on the motorcycle SP8 came in his car, introduced himself as a policeman and started to interrogate them. SP8 accused him of being a drug dealer to which he denied. Shortly afterwards a police party arrived in two cars and arrested him and Murthi. They were then bundled into the back seat of one of the cars and taken to a house where one Aruldass lived. Aruldass was also arrested and put in another car. All of them were taken to a police station. At the police station he was punched many times by the police and was asked to admit possession of a black plastic bag which he had seen earlier at the gear box section of the car. He did not admit. He contended that there was bad blood between him and Aruldass because he and Murthi used to disturb Aruldass's sister. As a result there was a serious fight between him and Murthi on one side and Aruldass and Suresh on the other which took place at a coffee shop in Taman Bertuah about a month before the arrest. After the fight Aruldass had warned him that he would be put to jail. Three weeks later Suresh met up with him at the same coffee shop in Taman Bertuah and offered to settle and find a way to raise money. He asked Suresh how that could be done, and Suresh replied that he would give him some drugs to sell. He refused but Suresh asked him to think about it. Five days later at the same coffee shop he and Murthi were again asked by Suresh and Aruldass whether they agreed to the arrangement to deal with drugs, to which they replied they would not do it. Aruldass responded by saying that it was alright and left the coffee shop. The gist of the defence is that the appellant was framed-up by Aruldass.

Having reviewed the findings of primary facts made by the learned judge we are satisfied that there is nothing to justify our interference with the findings based either on the credibility of witnesses or upon inferences drawn from other facts. Therefore, we decline to disturb the conclusions made by the trial judge.

Before us the conviction is being attacked on five main grounds. The first ground involves the provisions of adverse inference under s. 114(g) of the Evidence Act 1950 (1950 Act). It was contended by En. Gurbachan that Suresh played an important role in the transaction. He was not just an introducer as concluded by the learned judge but the negotiator for the drug deal and hence,

a trafficker. That being the case, he ought to have been called by the prosecution or offered for cross-examination or at least made available to the defence at the close of the case for the prosecution or in default, or otherwise been given an explanation why they were unable or unwilling to call him. And further there was no suggestion that his testimony would have been hostile to the prosecution or unreliable. Therefore, by such failure not only there was a gap in the narrative of the prosecution without the negotiator's testimony but also the presumption under s. 114(g) of the 1950 Act would have been attracted. The learned counsel cited the Supreme Court case of *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 in support thereof. Upon scrutiny of the notes of proceedings it was obvious that at the close of the case for the prosecution Suresh was neither called by the prosecution nor made available to the defence and the issue was taken up by En. Naidu, the learned counsel for the appellant, in his submission before the trial court both at the close of the case for the prosecution and at the close of the defence. On this issue the learned judge said:

> Learned counsel for the appellant had submitted that the failure by the prosecution to call Suresh as a witness or have him at least offered for cross examination was fatal to its case, and had raised an adverse presumption under s. 114(g) of the Evidence Act. My view is that Suresh although his identity was known to the appellant, would not throw any further light on the prosecution story that had not already been fully narrated by SP8. Suresh played the role as an introducer, the person who had brought SP8 and the appellant into contact. It was in evidence and this fact was not disputed under cross examination that Suresh thereafter disappeared from the scene and was in no way involved in the negotiation on the buying and selling of the cannabis that took place between the agent provocateur, SP8 and the appellant. It was only during their second meeting, in the absence of Suresh, that details on the delivery of the drugs were discussed and agreed upon. In view of the clear and uncontradicted evidence adduced by the prosecution I held the view that even if Suresh was called to testify, it would have not made any difference, and as such the presumption of an adverse inference cannot be invoked against the prosecution. In the Supreme Court case of *Namasayiam & Ors v. Public Prosecutor* [1987] 2 MLJ 336 it was found that an informer had played an active role to be an accomplice in the true sense of the word.
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> However it was held that in the light of the overwhelming prosecution evidence, the presence of the informer at the trial would not have made any difference, and that s. 114(g) of the Evidence Act was not applicable.

Ti Chuee Hiang v. PP supra is a recent decision but it is not applicable here, for two reasons. Firstly, in that case although the counsel for the appellant had criticized the prosecution for failing to call the informer, the judge did not direct his attention to that point at all and for that reason the Supreme Court concluded that there was a serious misdirection by way of non-direction

which had occasioned a grave miscarriage of justice in the trial court, and whereas in the case before us the learned judge did direct his mind to that point and therefore, there was no serious misdirection. Secondly, the prosecution, through the testimony of SP8, did explain why it was not able to call Suresh. SP8 deposed in the examination-in-chief:

> Saya telah cuba mencari orang bersama Suresh tetapi tidak berhasil sehingga kehari ini. Saya dapat tahu rumahnya beralamat 236 Taman Lintang Sg. Siput dan telah pernah pergi kerumah itu tetapi tidak dapat mengesan Suresh. Pihak Polis masih cuba mengesan Suresh sekarang.

And when cross-examined by Encik Naidu he said:

> Tidak benar yang saya betul-betul tidak cari Suresh.

He was not seriously challenged by the defence on this matter. Therefore, to our mind, the prosecution had sufficiently discharged its statutory duty in this respect. We follow the earlier decision of the Supreme Court relied upon by the learned judge.

Also, on the first ground, before us En. Naidu raised the issue of non-calling of Aruldass as a witness by the prosecution. In our view, as Aruldass was called as a witness for the defence and having regard to his testimony clearly this ground has no merit. Perhaps it may be useful to quote what was said by Ong J (as he then was) in *Mohamed Ali v. PP* [1962] 28 MLJ 230 on presumptions of fact and presumptions of law, *viz*:

> In drawing presumptions under section 114 of the Evidence Ordinance, 1950, it is to be observed that what the section says is that the existence of certain facts may be presumed which the court 'thinks likely to have happened' in the circumstances of the particular case. Presumptions of fact must not be drawn automatically, or, as it were, by rule of thumb, without first considering whether in the circumstances of each particular case there were adequate grounds to justify any presumption being raised. Even, with regard to presumptions of law, Devlin LJ said recently in *Berry v. British Transport Commission* [1961] 3 WLR 450, 463:
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> > ... Presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable – in the sense that 'estoppels are odious', and the doctrine should never be applied without a necessity for it'; per Bramwell L.J. *Baxendale v. Bennett* [1878] 3 QBD 525, 529 – because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own.

On the second ground, En. Naidu contended that there was a break in the chain of evidence in relation to the identity of the exhibits, that is to say, the cannabis especially as to their colour, recovered at the time of the arrest until its production in court. He relied on the evidence of SP5 who said "Warna basicnya adalah warna daun-hijau ...", the evidence of SP8 who deposed "Warna ketulan mampat itu ialah kehijauan dan kuning-kuning semasa saya melihatnya." and on the evidence of SP6 (the Chemist) who stated "... didalam peket plastic tersebut terdapat tiga bahan tumbuhan mampat" in order to show inconsistencies between the testimonies of the witnesses. We find no merit in his contention because the facts revealed that the drug found in the black plastic bag was in the form of three slabs of compressed cannabis and the drug found in the orange plastic bag, which was recovered from the appellant's body, was in the form of loose dried plant materials which was the subject-matter of a charge under s. 6 of the Act of which he was acquitted and discharged. SP8 and SP6 talked about the former and whereas SP5 spoke about both the former and the latter. We find no inconsistencies between them except that SP8 did mention the colour of the compressed cannabis and whereas SP6 made no mention about it and SP5 did describe the colour of both forms where green was the basic colour.

With regard to the third ground, En. Naidu asserted that SP6 did not comply with the provisions of s. 37(j) of the Act when taking samples of the drug for analysis. SP6 stated:

> Seterusnya saya telah membuat satu proses saintifik iaitu proses 'random sampling' dengan mengambil sebanyak 32 sample rawak (random sampling) daripada 'A1', 32 sample rawak daripada 'A2' dan 32 daripada 'A3' dan 16 sample rawak dari 'B'. Sampel-sampel rawak ini saya telah bahagikan kepada dua, satu untuk ujian 'Duquenois – Levine' dan sebahagian lagi untuk ujian kromatografi lapisan nipis (Thin Layer Chromathography).

It is manifestly clear that the provisions of s. 37(j) of the Act had been complied with, in fact samples from all the compressed slabs of cannabis had been taken for analysis. On this issue, the learned judge concluded:

> I had considered appellant's counsel's submission on the infirmities of the chemist's analysis on the subject drugs and found them to be without merit. The court was satisfied that the analysis was properly undertaken and concluded it to be without any flaw. There was no evidence from any expert to contradict the chemist's finding, it must therefore be accepted at face value as true and accurate (see *Munusamy v. PP* [1987] 1 MLJ 496).

We agree with that conclusion.

In respect of the fourth ground, En. Gurbachan submitted that the learned judge had misdirected himself in commenting on the failure of the defence to call witnesses to support the appellant's story about the alleged fight at the coffeeshop in Taman Bertuah and cited the cases of *Illian & Anor v. PP* [1988] 1 MLJ 421 and *Goh Ah Yew v. PP* [1949] 15 MLJ 150 in support thereof. We agree that the learned judge was wrong to have done so. However, the misdirection by itself was not sufficient to displace the findings of fact and the conclusions made by the learned judge on the alleged fight in the face of the overwhelming evidence to support the conviction.

On the last ground, En. Gurbachan strenuously attacked the final conclusion made by the learned judge. The learned judge concluded:

> In the end, this court was left with no doubt that the prosecution had satisfied its onus of proof and that the appellant had failed, **on a balance of probabilities** to raise any reasonable doubt on the prosecution's case.

He argued that as the prosecution did not rely on any statutory presumption to prove its case the defence had a lesser burden to cast a reasonable doubt in the prosecution's case. The inclusion of the words 'on a balance of probabilities' by the learned judge had placed an onerous burden on the defence and therefore, a serious misdirection. We are of the view that this passage must not be looked at in isolation but to be read together with the whole judgment. The learned judge stated:

> It may be convenient at this point to immediately state that the court found this explanation to be too far fetched to be believable, and further, on an objective assessment, had found it to be too fanciful to cast a reasonable doubt on the prosecution's case (*Mohd Yatin v. PP* [1950] MLJ 57).
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> (at page 20 of the Appeal Record)
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> In my view the evidence of these two witnesses, called by the defence, completely destroyed any chance of my finding that the appellant's story might be worthy of creating a reasonable doubt, even if unbelievable.
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> (at page 21 of the Appeal Record)
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> Having heard and seen the appellant, I have no hesitation, in evaluating his evidence, to totally reject it as one too incredible to be believed. In short, his story was a complete lie and had not raised any reasonable doubt on the prosecution's case.
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> (at page 22 of the Appeal Record)

From these passages we are satisfied that the learned judge had made the correct conclusion on the burden of proof after having properly and adequately assessed the evidence before him especially the defence. We have scrutinised the whole evidence and we are satisfied that there is overwhelming evidence to show that the prosecution had proved its case beyond reasonable doubt and that the defence had failed to raise any reasonable doubt on the prosecution's case. Therefore, we regard the inclusion of the words 'on a balance of probabilities' as mere verbosity. In *Shanmugam a/l Munusamy v. PP* [1999] 1 CLJ 783, the trial judge said that there was a *prima facie* case against the appellant that if unrebutted would render a conviction. This court, after having gone through the evidence adduced by the prosecution and having no doubt that there was ample evidence to show at the end of the prosecution case that the prosecution had proved its case beyond reasonable doubt, held that the choice of the words *'prima facie'* was only the wrong usage of words. Whatever it is, to our mind, this is a fit and proper case to apply the proviso to the provisions of s. 60(1) of the Courts of Judicature Act 1964 as we consider that no substantial miscarriage of justice had occurred.

For the above reasons, we find there is no merit in this appeal.